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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 730

FOREIGN TRADE MANAGEMENT COMPANY, INCORPORATED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 12-15) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 15). A motion for a new trial was denied on March 11, 1948 (R. 15). On December 23, 1947, by order of the Chief Justice, the time for filing a petition for a writ of certiorari

was extended to and including April 15, 1948 (R. 18). The petition for certiorari was filed on April 9, 1948. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

In late 1941 and early 1942, petitioner contracted to and did sell certain quantities of Portuguese East African copra to South American purchasers at prices ranging from $135 to $145 a ton. Several months thereafter, it imported some 1,400 tons for transhipment to two of these customers at $182 and $196 a ton, but it was prevented from consummating these sales by the Government's revocation of the licenses required for such exports during wartime. The copra was thereafter requisitioned by the United States.

The question is whether the Court of Claims erred when, after it had held that just compensation should be determined by reference to the export rather than to the domestic copra market price, it rejected the prices of the two frustrated sales and relied on the prices at which the earlier contracts and sales had been made, as the measure of such export market price.

STATUTE INVOLVED

Sections 1 and 2 of the Act of October 10, 1940, as amended (c. 836, 54 Stat. 1090; c. 471, 56 Stat.

467; 50 U. S. C. App., Supp. III, 711, 712) read as follows:

> That whenever the President determines that it is necessary in the interest of national defense or prosecution of war to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies, necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been prohibited or curtailed in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress; 54 Stat. 714), as heretofore or hereafter amended, or any other law, he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of,

and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940.

SEC. 2. Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41(20) and 250, title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages.

STATEMENT

This case involves the requisition, in July and August of 1942, of certain quantities of copra, the raw material from which coconut oil and, ulti-

mately, soap, glycerin, and nitroglycerin are processed.

On January 12, 1942, by order of the Acting Director of Priorities (7 F.R. 223), private transactions in copra were subjected to the restrictions on importation and disposition which had theretofore been made applicable to other strategic materials of war (6 F.R. 6796, 7 F.R. 206). Thereafter, in May, 1942, the Combined Food Board for the Allied Nations so regulated the purchase and distribution of the world's fats and oils as to make it impossible for private persons to obtain copra for sale in the United States and South America except in Portuguese East Africa and Honduras (R. 9). Under the arrangements made, all purchases in the zone allotted to the United States were made by the Government itself, acting through Commodity Credit Corporation, and from May to December, 1942, that agency purchased 68,630 tons of copra at prices ranging from $95 to $129.60 a ton (R. 9, 10).[1] This copra was sold to crushers at the price of $106.25 per ton, and they were required then to resell the coconut oil extracted to the Government at the established ceiling price of 8 cents per pound (R. 9-10).

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[1] References in the record are uniformly to long tons. The quotations of prices vary, however, some being f.o.b New York, some f.a.s. New York, c.i.f New York, c.i.f. New Orleans, etc. Since the court below made no specific findings as to the costs of transportation, insurance, etc., the record affords no basis for equating the quotations, and we have therefore omitted the references to the terms of the sales.

The copra here in question was purchased by petitioner in Portuguese East Africa under a contract entered into on or about August 21, 1941 (R. 4). Petitioner is a New York import and export corporation, engaged, in part, in the sale of copra in foreign markets (R. 4, 7). The copra was purchased at $71 a ton, and, though it was destined for Colombia and Venezuela, the lack of ships plying between East Africa and South America compelled petitioner to arrange shipment through the United States, increasing the cost to petitioner, by the time the copra reached New Orleans, from which it was to be transhipped to South America, to $106.43 a ton (R. 4, 5, 7).[2]

At the time the copra was shipped from Portuguese East Africa, petitioner had contracts to sell between 6,000 and 7,000 tons to South American customers, and the shipment to New Orleans was

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[2] Petitioner's statement that the copra was originally destined to Trinidad and unloaded in the United States only upon the intervention of the Board of Economic Warfare because it was considering the requisitioning of all copra (Pet. 4-5, 19) has no support in the record and is wholly unwarranted. The transcript reference relied on (1 Tr. 23-28) does not deal with the subject at all, and Exhibit 53, also cited, was never properly received in evidence, for reasons which petitioner's counsel himself advanced. See 1 Tr. 151-156. On the other hand, all the documents affecting the shipment—the bills of lading, application for import shipping priority rating, application for export licenses, financing arrangements, etc.—demonstrate that the arrangements made were that the copra was to be delivered to New York (Plff's. Exs. 8, 14, 15, 16, 17). And there is nothing in the record to indicate that these arrangements were inspired by the Board of Economic Warfare or that any different arrangements for unloading the cargoes were at any time made or approved by the appropriate governmental authorities.

for the purpose of exporting the copra from that port to South America (R. 4, 7). After the copra arrived at New Orleans, export licenses were granted authorizing petitioner to ship 840 tons to Banco Mercantil Agricola, Puerto Cabello, Venezuela, and 610 tons to Industria Refinadora Nacional Ltda., Cartagena, Colombia (R. 7).[3] By contract, the Venezuelan consignee had agreed and was financially able and willing to pay $182 a ton for the copra; and the Colombian purchaser, $196.36 a ton (R. 8). Four days after they had been granted, the export licenses were revoked, and petitioner's repeated requests for their reinstatement were denied (R. 7). There were two reasons for cancellation: (1) petitioner had represented in its application for the licenses that the value of the copra was considerably less than the prices at which it had contracted to sell it, and (2) it had been reported that the potential consignees

[3] Wartime restrictions made it impossible for copra to be exported from the United States except on special licenses. Section 6 of the Act of July 2, 1940 (54 Stat. 712) authorized the President, by proclamation, to prohibit or curtail the exportation of military supplies whenever he determined that it was necessary to do so in the interests of national defense. By Proclamation 2413, issued on July 2, 1940, the President determined that certain products and materials should not be exported from the United States except when authorized by a license issued by the Secretary of State (5 F.R. 2467), and regulations governing the exportation of those articles were issued the same day (5 F.R. 2469). By Proclamation 2463, issued on March 4, 1941, the President determined that it was necessary, in the interests of national defense, that copra (as well as glycerin and coconut oil, products processed from copra) should not be exported except when authorized by license, as provided in Proclamation 2413 (6 F.R. 1299).

were on the proclaimed list of persons believed to be dealing with our enemies (R. 7-8).[4]

Although for some three years prior to Pearl Harbor, the market for copra had been stable, the prices ranging between $36.50 and $50.00 a ton, the price began to advance appreciably about that time (R. 10). Just prior to and immediately following Pearl Harbor, petitioner entered into contracts for the sale of Portuguese East African copra to certain Colombian and Venezuelan purchasers—among them the two proposed consignees of the requisitioned copra—at prices ranging from $135.00 to $145.00 a ton, and in March, 1942, petitioner shipped to Colombia approximately 390 tons of copra, which had been sold in 1941, for $140.00 a ton (R. 8, 9).[5]

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[4] Apparently it was not so much the fact of misrepresentation of value as of exorbitance of price which impelled the revocation of the licenses. The State Department believed that the good neighbor policy required the Government to prevent exporters in the United States from overcharging South American consignees, and, therefore, licenses were denied exporters where the prices were deemed unreasonably high (R. 13, Tr. 774-776).

The refusal to grant export licenses for shipments to persons on the proclaimed list was, of course, in order to insure that strategic materials would not be diverted to potential or declared enemies of the United States. There is no question that the officers in charge of export licensing were officially advised that petitioner's consignees were on the proclaimed list (R. 8), and, notwithstanding petitioner's suggestion to the contrary (Pet. 3), there is nothing in the record to indicate that was not the fact.

[5] In the middle of 1942, a contract of sale was entered into for the purchase of 150 tons at $188.00 a ton, but this transaction was not carried through because shipping facilities could not be obtained (R. 9). During 1944, petitioner had six contracts for the sale of copra to South American firms at from $240.00 to $245.00 a ton, and an export license was granted to one of petitioner's subsidiaries for the shipment of 1,000 tons to Columbia at $240.00 a ton (R. 9).

On July 24 and August 7, 1942, pursuant to requisitions issued by the Board of Economic Warfare under the authority of the Act of October 10, 1940, as amended, *supra,* pp. 2-4, respondent took possession of an aggregate of 1422.223 tons of the copra which was being held in New Orleans for petitioner (R. 5). Petitioner filed a claim, requesting compensation at the rates of $182 and $196.36 a ton, the prices at which it had contracted to sell the copra (R. 5-6). A hearing having been held before its Compensation Board, the Board of Economic Warfare, on March 15, 1943, rejected petitioner's claim and determined that the fair and just compensation for the requisitioned copra was $155,597.33, computing the compensation at the rate of $106.25 a ton, the price at which Commodity Credit Corporation was selling copra in the domestic market (R. 6). The liens to which the copra was subjected were paid off and the balance awarded to petitioner, but it elected to reject the award on the ground of inadequacy and to take only 50 per cent., reserving its rights to proceed in the Court of Claims (R. 5, 6-7).

On July 10, 1943, petitioner filed its petition in the Court of Claims (R. 1-3), and a general traverse having been filed (R. 3), testimony taken, and the case argued and submitted, the court, on December 1, 1947, filed its special findings of fact (R. 4-12), conclusion of law, (R. 12), opinion (R. 12-15), and judgment (R. 15). The court decided that petitioner was entitled to the "ex-

port market price" for the copra taken, but concluded that $145 a ton was the "export market price" at the time of the requisition (R. 13-14). A motion for a new trial thereafter made by respondent was denied (R. 15).

ARGUMENT

Respondent believes that the court below erred when it awarded petitioner an "export market price" for the requisitioned copra. The record fails to show any exportation of copra at the time of the requisition significant enough to constitute a "market." The only market then available appears to have been the domestic one, and it is the price there which should have controlled.

Petitioner, however, does not quarrel with the court's ruling in that respect. Its only complaint is that the court calculated the "export market price" by reference to certain contracts and sales made some months prior to the requisition rather than to the contracts, frustrated by governmental regulation, by which petitioner had agreed to sell the particular copra requisitioned. If we accept the court's rule of just compensation, however, as does petitioner, it seems quite proper to have relied on transactions other than those which were prohibited by the Government's export regulations, in part, at least, because of the exorbitance of the contract prices involved. We submit that there is no showing that the judgment below does not afford petitioner just compensation and that

the question raised by the petition is not of such importance as to warrant review by this Court.

It is clear, of course, that petitioner is not entitled to receive the prices at which it had contracted to sell the requisitioned copra merely because performance of those contracts was frustrated by the Government. The United States requisitioned the copra, not the contracts of sale. Compare *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, with *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106. In those circumstances, as this Court indicated in *Omnia Commercial Co.* v. *United States, supra,* at 511, the contractor is entitled "not to the price fixed by the contract but to the just compensation guaranteed by the Constitution". Furthermore, it was not the requisition but, rather, the denial of export licenses which prevented petitioner from carrying out the contracts, and whatever damages and losses may have resulted from such interference are not legally compensable. *Bowles* v. *Willingham,* 321 U. S. 503, 517-519; *Omnia Commercial Co.* v. *United States, supra; Morrisdale Coal Co.* v. *United States,* 259 U. S. 188. For "* * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose * * *." *United States ex rel. T.V.A.* v. *Powelson,* 319 U. S. 266, 281-282.

Petitioner, then, is entitled to no more than the value of the copra taken. And since the criterion

which the courts normally employ for determining just compensation is the market value of the property at the time of taking (*Albrecht* v. *United States,* 329 U. S. 599, 602; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377; *United States* v. *General Motors Corp.,* 323 U. S. 373, 379; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 275), this case comes down merely to the question of ascertaining such value. In discovering the market value, it seems as relevant to consider the prices fixed in contracts and sales some months prior to the requisition as those at which petitioner contracted to sell the particular copra involved. Moreover, since the latter were so high that the necessary licenses for sales at those levels were denied petitioner, the court was fully justified in rejecting them as indicia of actual market conditions. In any event, as this Court has remarked, "* * * even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety * * *" and all that can be expected in eminent domain proceedings is that "substantial justice" will be done. *United States* v. *Miller,* 317 U. S. 369, 374, 375. We submit that, so far as the determination of "export market price" is concerned, substantial justice has been achieved.

The issue which the petition raises is, at most, a factual one, limited in its application to this case.

It has no general importance. Consequently, review by this Court seems unwarranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1948.

U. S. GOVERNMENT PRINTING OFFICE, 1948